Petition

81-1199

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CASE No:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981.

DONALD HUGHES

Petitioner

—*vs*—

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (FORMER FIFTH CIRCUIT CASE)

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QUESTIONS PRESENTED

The questions presented by this Petitioner for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (former Fifth Circuit case) are:

(1) Is the prohibition under Rule 609 of the Federal Rules of Evidence which prohibits the introduction into evidence of any arrests and/or investigations for the purpose of impeachment of a witness, violative of due process when said Rule is applied to a witness who is a confidential informant, who has been arrested and is under investigation, but who has not been convicted only because of protection given to him by the United States Department of Justice and other law enforcement agencies? .

(2) Is it proper to exclude evidence of a confidential informants-other crimes, wrongs or acts when same were to be used in order to show or prove motive, opportunity, intent preparation and/or knowledge despite the express permissibility of said evidence pursuant to Rule 404 Federal Rules of Evidence?

(3) Is it proper to exclude evidence of a confidential informant's other crimes, wrongs, or acts when same constitutes a major portion of the proposition forming the defense and when these crimes, wrongs or acts are matters that are in issue and are probative of matters that are in issue (Rules 401, 402 Federal Rules of Evidence)?

(4) Is the Government, prior to introducing tape recorded conversations, required to go forward with proof with respect to the competency of the operator, fidelity of the recording equipment, absence of material deletions, additions and/or alterations, and identification of relevant speakers?

(5) If the Government does not meet its burden of proof prior to indroducing into evidence tape recorded conversations, may the tape recorded conversations be admitted into evidence at trial and played before the jury?

(6) If the chain of custody is irreperably broken, may the physical evidence be admitted anyway despite the fact that the Government could not show that it was in substantially the same condition as when the alleged crime was perpetrated?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
STATEMENT OF CASE	2
OPINIONS BELOW	5
JURISDICTION	6
CONSTITUTIONAL PROVISIONS INVOLVED	6
REASONS FOR GRANTING WRIT	
1. The application of Rule 609 Federal Rules of Evidence to Confidential Informants effectively denies a criminal defendent due process under the law.	11
2. Rule 404 of the Federal rule of Evidence permits the introduction of evidence of a confidential informant's other crimes, wrongs or acts when same are being introduced in order to show or prove motive, opportunity, intent, preparation and/or knowledge.	12
3. The trial court improperly and erroneously permitted the Government to introduce into evidence tape recorded conversations without first requiring the Government to lay a proper foundation.	13
4. The chain of custody of the physical evidence was irreperably broken and the trial court, despite the Government's inability to show that it was in substantially the same condition as when the alleged crime was perpetrated, erroneously permitted it into evidence at trial.	15
CONCLUSION	17

APPENDIX 18

1. United States Court of Appeals for the Fifth Circuit decision. A-1 - A-10
2. Decision of the United States District Court for the Southern District of Florida. A-11
3. Order on pre trial motion. A-13

CITATION OF AUTHORITY

1. *Lassiter v Department of Social Services of Durham County,* ___ U.S. ___, 101 S. Ct. 2153, ___ L.Ed 2d ___ (1981). 11
2. *Gallego v U.S.* 276 F.2d 914 (9th Cir. 1960); 15
3. *Pullman Co. v Hall* 55 F.2d 139 (4th Cir. 1932). 13
4. *Statinsky v Bailey,* 330 F.2d 136 (8th Cir. 1964). 14
5. *United States v Alvarado.* 519 F.2d 1133 (5th Cir.) Cert. denied, 424 U.S. 911, 96 S.Ct.1107, 47 L.Ed 2d 315 (1975). 11
6. *United States v Clark,* 425 F.2d 827, 833 (3rd Cir. 1979). 16
7. *United States v DeFillipo* 590 F.2d 1228 (2nd Cir. 1979). 12
8. *United States v Jones,* 404 F.Supp.529 (1975). 14
9. *United States v Long* 574 F.2d 761 (3rd Cir.1978). 12

10. *United States v McKeever*, 14
169 F.Supp 426 (S.D.N.Y.1958).
rev'd on other grounds, 271 F.2d 699 (2nd Cir.1959).

11. *United States v McMillan* 14
508 F.2d 101 (8th Cir.1974).

12. *United States v O'Connor* 12
580 F.2d 38 (2nd Cir.1978).

13. *United States v Oliver* 13
492 F.2d 943 (9th Cir.1974).

14. *United States v Penick & Co.* 15
2nd Cir. 136 F.2d 413. (2nd Cir. 1943).

15. *United States v Robinson*, 16
145 U.S. App. DC 46
447 F.2d 1215, 1220 (1971).

16. *Wood v Georgia*, 12
— U.S. —
101 S.Ct. 1097
— L.Ed.2d — (1981).

United States Constitution:
Amendment IV 6
Amendment V 6
Amendment VI 7

United States Supreme Court Rules: 7
Rule 17.

U.S.C.
Title 28 § 1254. 6

Federal Rules of Evidence:
Rule 401 Federal Rules of Evidence 8-12-13
Rule 402 Federal Rules of Evidence 8-13
Rule 404 Federal Rules of Evidence 8-12
Rule 609 Federal Rules of Evidence 9-11

3 Wigmore Evidence § 922 13

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OCTOBER TERM, 1981.

DONALD HUGHES

Petitioner

—*vs*—

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (FORMER FIFTH CIRCUIT CASE)

Petitioner, Donald Hughes, seeks to have this Court issue its Write of Certiorari to the United States Court of Appeals for the Eleventh Circuit (former fifth Circuit case) to review the decision of that Court affirming the conviction of Petitioner, which occurred before the United States District Court for the Southern District of Florida.

STATEMENT OF THE CASE

On November 5th, 1979, Drug Enforcement Administration Agent, Gene Russell Bachman testified that he came into contact with Kenneth Lankford. Mr. Lankford was to become the Confidential Informant in this case. Subsequent to meeting with Lankford and making all applicable arrangements with Lankford, Bachman along with Lankford and Pompano Beach Police Officer Barbara Wirth made an initial contact with Donald Hughes. At this meeting Bachman and Wirth posed as prospective buyers of Cocaine.

On the 14th November, 1979, Hughes, according to Bachman, advised him that another source of cocaine would have to be checked out or sought after. Later this same day Bachman testified that Hughes telephoned him from Lankford's residence and that Hughes, during this conversation advised him that he had in his possession one kilogram of cocaine. A meeting was arranged between Hughes, Lankford and Bachman at the Howard Johnsons Hotel in Fort Lauderdale. The location of this meeting was selected upon the suggestion of informant Lankford. Bachman, Lankford and Wirth then proceeded to the site of the meeting with Hughes. Because no rooms were available, Bachman and Wirth remained in the hotel's parking lot and Lankford went inside the hotel in order to intercept any phone calls that Hughes might make to them. Upon Hughes arrival Lankford then registered and secured a heretofore unavailable room, room number 221.

Hughes, Lankford and Bachman proceeded to the room, the details as to the mechanics of the transaction were worked out and Hughes left the hotel room allegedly to secure the possession of the cocaine and return with Mr. Mann. *Bachman then left the room* and upon his return to the room he found a package of white powder on the room's desk. Bachman and Lankford opened the bag which contained the white powder, Landford and only Lankford

approved the contents, and Bachman and Hughes left the room to get the money. Lankford and Mann were left alone with the bag of white powder. Upon reaching the parking area Bachman arrested Hughes after giving a pre-arranged signal.

On two occasions the bag of white powder was out of Bachman's sight and in the possession or control of Lankford. Hughes testified that the bag he brought to the room contained not cocaine but rather mannitol, and that Lankford had to have switched bags if cocaine was to have been present. As a matter of fact when Bachman returned to the room after arresting Hughes he found Lankford and Mann with "several lines of cocaine." Bachman subsequently learned from Mann that Lankford in fact possessed cocaine and Lankford handed to Bachman a package of cocaine.

Neither Lankford, the informer, or the hotel room was searched prior to Lankford entering the room. It was Lankford who was alone in the hotel for fifteen minutes, it was Lankford who secured the room and it was Lankford who initially took possession of the cocaine, kept possession of the cocaine and sampled the cocaine for purety.

A three-count indictment was handed down on November 26, 1979, in the United States District Court of Florida which charged Donald Hughes and two others with (a) Conspiracy to Distribute Cocaine (Count I), (b) Possession with Intent to Distribute Cocaine (Count II), and (c) Distribution of Cocaine (Count III), in violation of Title 21 U.S.C. 841 and 846, and Title 18 U.S.C. 2.

Hughes' defense was based on Lankford switching cocaine for mannitol. Hughes did not deliver cocaine but rather mannitol and only Lankford, the informer who wished to remain out of jail, had the opportunity to make the switch.

The Government's own witness Mr. Jeffrey R. Hufsey, a Forensic Chemist, gave credence to Hughes' defense. Mr. Hufsey who analyzed the cocaine, stated that mannitol may have been in the bag, was taken out, and cocaine was then placed into the bag. That this would explain why the cocaine was of very high purety but the bag contained three percent mannitol.

Based upon the foregoing Appellant was convicted on Counts I and III, but acquitted of Count II, Possession with Intent to Distribute. Appellant was sentenced to one year imprisonment as to Count I, and one year imprisonment as to Count III. Execution of the sentence of confinement was as to Count III suspended and the Appellant was placed on probation for three years to run concurrent with the sentence imposed on Count I.

From the above said conviction (Appended hereto as A-11) Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit (former fifth circuit case). On October 5th. 1981 the judgment of the District Court was affirmed (Appendix A-1). The instant petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit follows.

OPINIONS BELOW

The opinion and order of the Former Fifth Circuit, the United Stated Court of Appeals, Eleventh Circuit denying petitioner's appeal and affirming the District Court's rulings, judgment and sentence, ___F.2d___ (1981), is appended to this Petition for Certiorari as Appendix A-1. The District Court for the Southern District of Florida did not issue a written opinion; it issued oral rulings denying petitioner's attempts to exclude and/or suppress evidence and impeach the confidential informants. (A-13)

JURISDICTION

The judgment of the District Court in and for the Southern District of Florida was entered on the 19th day of September, 1980. A timely appeal was filed to the Circuit Court of Appeals, Eleventh Circuit (former Fifth Circuit), and, the District Court's rulings were affirmed on October 5th, 1981. The certiorari jurisdiction of this Court to review the decision of the Circuit Court of Appeals for the Eleventh Circuit is invoked pursuant to Title 28 U.S.C. § 1254.

Constitutional Provisions and Applicable Rules

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Supreme Court, Rule 17

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2 The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Rule 401, Federal Rules of Evidence.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence.

Rule 402, Federal Rules of Evidence.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 404, Federal rules of Evidence.

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 609, Federal Rules of Evidence.

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction,

whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

REASONS FOR GRANTING THE WRIT

POINT I

The application of Rule 609 Federal Rules of Evidence to Confidential informants effectively denies a criminal defendent due process under the law.

Rule 609 of the Federal Rules of Evidence prohibits the introduction into evidence of testimony regarding arrests or criminal investigations. *United States v Alvarado*, 519 F.2d 1133 (5th Cir.), cert. denied, 424 U.S. 911, 96 S.Ct. 1107, 47 L.Ed 2d 315 (1975). This prohibition is both necessary and proper as it applies to members of the general public. However when a witness is a confidential informant who is under the protective umbrella of the United States Department of Justice and other law enforcement agencies, he may be arrested or under investigation but he would not be brought to trial and convicted. But for this protective shield embracing this confidential informant he would have had a record of convictions rather than merely arrests and/or investigations. In this situation it is highly improper and a denial of due process to exclude testimony of arrests and/or investigations when this is the sole avenue of approach left open by the Government's jealous protectiveness of the informant's record. Rule 609 basically can be restated to read that: Evidence that a witness is a criminal or that he has dealt in criminal activity does not exist, as a matter of law, when the Government in order to avoid impeachment of its informant does not, by agreement with the informant, prosecute him for his crimes. This course of action by the Government coupled with the dictates of Rule 609 led, in the instant case, to fundamental unfairness and this is a denial of due process of law. *Lassiter v. Department of Social Services of Durham County*, ___ U.S. ___, 101 S.Ct. 2153, ___ L.Ed. 2d ___ (1981). Furthermore this due process violation is apparent based upon the facts of this case and this Court is empowered to consider the due process

issue. *Wood v Georgia*, ___ U.S. ___, 101 S.Ct. 1097, ___ L.Ed 2d ___ (1981). Based upon the foregoing argument Petitioner maintains that review of the Order of the United States Court of Appeals for the Eleventh Circuit is necessary and proper and reversal is required.

POINT II

Rule 404 of the Federal Rule of Evidence permits the introduction of evidence of a confidential informant's other crimes, wrongs or acts when same are being introduced in order to show or prove motive, opportunity, intent, preparation and/or knowledge.

Rule 404's draftsman provided for the admissibility of "other crimes" or "bad acts", evidence intended that this rule be construed as one of inclusion and not exclusion. *United States v Long*, 574 F.2d 761 (3rd cir. 1978). This rule permits the inclusion of evidence of "other crimes" or "bad acts" especially, as in this the instant case, where it is specifically relevant to an actual issue in the case; that of showing the motive, opportunity, intent, preparation, plan and/or knowledge of the confidential informant. *United States v DeFillipo*, 590 F.2d 1228 (2nd Cir. 1979). In the instant case the Government never argued that this evidence's probative value was outweighed by its potential to be unfairly prejudicial to the Government's case. See: *United States v. O'Connor*, 580 F.2d 38 (2nd Cir. 1978). The trial judge therefore abused his discretion in not admitting the evidence in question since no determination or balancing was ever done pursuant to Rule 403 Fed. R. Evid. nor was this Rule's application ever raised by the Government. See: *United States v Long*, supra.

Lastly the evidence sought to be presented on behalf of Petitioner was relevant in that it definitely had the tendency to make the existence of the confidential informant's motive, plan, opportunity, intent and/or knowledge known to the jury. Rule 401 Fed.R.Evid. The evidence of the informant's other crimes, wrongs, or acts constitutes a major

portion of the Petitioner's defense and was admissible into evidence since these matters were in issue and were probative of the matters which were in issue. Rules 401 and 402 Fed.R.Evid. Without this character evidence the jury had an inadequate basis for determining the credibility of the informant's testimony. There was furthermore no other feasibile substitute for this character evidence. *United States v. Oliver*, 492 F.2d 943 (9th Cir. 1974); *3 Wigmore Evidence* § 922 at page 447 (3d ed. 1940). The rule heretofore has been that:

> . for the purpose of impeaching the credibility of a witness he may be questioned as to misconduct, even as to collateral matters, which has a tendency to show his lack of honesty or truthfulness.
> *Pullman Co. v. Hall*, 55 F.2d. 139 (4th Cir. 1932).

Based upon the foregoing argument and in light of the authorities cited herein Petitioner respectfully requests that the judgment and order of the United States Circuit Court, Eleventh Circuit be reversed and this Court issue a Writ of Certiorari.

POINT III

The trial court improperly and erroneously permitted the Government to introduce into evidence tape recorded conversations without first requiring the Government to lay a proper foundation.

A proper foundation must be laid for the introduction of tape recorded conversations into evidence. Prior to the introduction of tape recordings into evidence the Government was required to show:

1. That the recording device was capable of taking the conversation now offered in evidence
2. That the operator of the device was competent to operate the device.

3. That the recording is authentic and correct.

4. That changes, additions or deletions have not been made in the recording.

5. That the recording has been preserved in a manner that is shown to the court.

6. That the speakers are identified.

7. That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

See: *United States v McMillan*, 508 F.2d 101 (8th Cir. 1974); *Statinsky v Bailey*, 330 F.2d 136 (8th Cir. 1964); *United States v McKeever*, 169 F.Supp.426 (S.D.N.Y. 1958), rev'd on other grounds, 271 F.2d 669 (2nd Cir. 1959).

The Government in the instant case tried to satisfy only one of the seven conditions percedent prior to introducing into evidence the tapes. The sole condition for which testimony was offered was in regards to the authenticity and correctness of the tapes. No other testimony was offered and the tape recordings were improperly admitted into evidence by the District Court.

Based upon the foregoing argument a Writ of Certiorari should be issued by this Court to the United States Circuit Court for the Eleventh Circuit.

POINT IV

The chain of custody of the physical evidence was irreperably broken and the trial court, despite the Government's inability to show that it was in substantially the same condition as when the alleged crime was perpetrated, erroneously permitted it into evidence at trial.

Before a physical object connected with commission of a crime can properly be admitted into evidence there must be a showing that such object is substantially in the same

condition as when the crime was committed. *Gallego v U.S.*276 F.2d 914 (9th Cir. 1960); *U.S. v Penick & Co.* 2nd Cir. 136 F.2d 413 (2nd Cir. 1943).

It is generally recognized that tangible objects become admissible as evidence only when proof of their original acquisition and subsequent custody forges their connection with the accused in a criminal offense.

In the case at bar there was a major break in the chain of custody, not between police and chemist where breaks often occur, but a major break from the very beginning.

The motel room in which the alleged transaction took place was ordered by the confidential informant. It was the confidential informant who actually examined the cocaine and it was the confidential informant, who tested and approved the quality of the cocaine. At that point the alleged cocaine was left in the exclusive possession of the Confidential Informant. Petitioner was arrested outside and only then did a Government Agent return to retrieve the cocaine. That the confidential informant tampered with the evidence is plain. From the testimony of the Government's agent and the confidential informant, it is uncertain whether the confidential informant actually switched mannitol to cocaine. However, what is certain is that the confidential informant did tamper with the evidence. Whether the confidential informant subtracted from, added to, or completely replaced the evidence is not certain, but what is certain is that the evidence was not the same when the Government's agent returned to the hotel room as it had been when he left the room with Petitioner. The Government could not as a matter of reasonable certainty, establish that the broken chain lead to no adulteration. In *U.S. v. Jones*, 404 F.Supp.529, (1975), the court held:

> The government must establish that the evidence is in substantially the same condition as it was when it was originally seized. *U.S. v Clark*, 425 F.2d 827, 833 (3rd Cir. 1970).
>
> The government must eliminate possibilities of misidentification and adulteration not absolutely, but as a matter of reasonable certainty. *U.S. v Robinson*, 145 U.S. App. D.C. 46, 447 F.2d 1215, 1220 (1971).

The government could not show within reasonable certainty that the evidence was not adulterated, for what the facts have shown is that the evidence was in fact *absolutely* adulterated by the confidential informant, and that the adulteration was not only inexcusable, but also rendered the evidence inadmissible.

Based upon the foregoing this Court should issue a Writ of Certiorari to the United States Circuit Court for the Eleventh Circuit.

CONCLUSION.

Wherefore, in light of the foregoing arguments, circumstances and authorities therein cited, the Petitioner respectfully requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

by: Maurice Graham

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I HEREBY CERTIFY that a true copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was mailed to Office Of the Solicitor General, Department of Justice, 10th and Constitution N.W., Washington, D.C. 20530 this 22 day of December, 1981.

By: Maurice Graham
Maurice Graham, Esquire

APPENDIX

1. United States Court of Appeals for the Eleventh Circuit decision. A-1 - A-10.

2. Decision of the United States District Court for the Southern District of Florida A-11.

3. Order on pre trial motion. A-13.

FORMER FIFTH
UNITED STATES v. HUGHES

UNITED STATES of America,
Plaintiff-Appellee,
v.
Donald HUGHES, Defendant-Appellant.
No. 80-5550.
United States Court of Appeals,
Fifth Circuit.*
Unit B
Oct. 5, 1981.

Defendant was convicted in the United States District Court for the Southern District of Florida, Alcee L. Hastings, J., of conspiracy to distribute cocaine and distribution of cocaine, and he appealed. The Court of Appeals, Henderson, Circuit Judge, held that: (1) trial court properly admitted the cocaine into evidence despite the fact that confidential informant could not resist taking a little for himself while Drug Enforcement Agency special agent was out of his presence; (2) trial court's prohibition of questions concerning confidential informant's address did not amount to plain error; (3) trial court properly admitted into evidence taped conversations between defendant, confidential informant, and DEA special agent; (4) prosecutor's closing remarks that defendant looked and acted like a drug dealer were not so prejudicial as to require a new trial; and (5) prosecutor's question on cross-examination of defendant as to whether his wife left him because of his participation in illegal drug transactions did not warrant a mistrial.

Affirmed.

*Former Fifth Circuit case, Section 9(1) of Public law 96-452—October 14, 1980.

Appeal from the United States District Court For the Southern District of Florida.

Before HILL, Circuit Judge, SMITH**, Judge, and HENDERSON, Circuit Judge.

HENDERSON, Circuit Judge:

On November 14, 1979, Special Agent Gene Bachman of the Drug Enforcement Administration (hereinafter referred to as "DEA") and Ken, a confidential informant, arranged by tape telephone conversations to buy one kilogram of cocaine from the appellant, Donald Hughes. Hughes agreed to consummate the sale that same day at a local motel. While Bachman waited for Hughes in the parking lot, Ken went inside and registered for a room. After Hughes arrived, the three men retired to the room to discuss the terms of the sale. Hughes then left to obtain the cocaine, returning a short time later with Michael Mann, who was carrying a cellophane bag containing a white powdery substance. Hughes manipulated the cellophane bag in order to show Ken and Bachman an unusually large "rock" of cocaine.[1] Both Bachman and Ken examined the contents of the bag and Ken, after tasting the powder, indicated his approval. Bachman and Hughes then left the room to get the purchase money from Bachman's car. When the two reached the parking lot, agents arrested Hughes and Bachman, returned to the hotel room, seized the cocaine and arrested Mann, who had remained in the room with Ken and the cocaine. Mann subsequently told a DEA agent that Ken had taken some of the cocaine. Upon learning that he would have to be searched, Ken handed

**Judge of the U.S. Court of Claims, sitting by designation.

1. A cocaine "rock" is a solid lump of cocaine powder and is usually of a higher purity than the cocaine surrounding it.

over the crushed remains of the cocaine "rock." Ken did not testify for the government at trial, but was called as a defense witness for purposes of impeachment. Hughes' defense is based on his own testimony that Ken contacted him in advance and duped him into believing that Ken and Hughes would be partners in a scheme to swindle Bachman by selling him mannitol, apparently a sugar substance, instead of cocaine. The appellant contends that Mann brought mannitol into the room and that Ken must have switched it for cocaine in an effort to place the blame on him.[2]

Following a jury trial in the United States District Court for the Southern District of Florida, Hughes was found guilty of conspiracy to distribute cocaine, 21 U.S.C. § 846, and distribution of cocaine, 21 U.S.C. § 841(a)(1), but was acquitted of possession whith intent to distribute cocaine. Having found no reversible error, we affirm his convictions.

Hughes initially claims that the admission of the cocaine into evidence was error because there was an interval between the time when he and Agent Bachman left the alleged cocaine in the hotel room in the possession of Ken and Mann and when the other agents appeared on the scene. The appellant argues that Ken switched real cocaine for the imitation substance while Hughes was being arrested. The trail judge was correct in admitting the cocaine, despite the fact that Ken obviously could not resist taking a little for himself while Agent Bachman was out of his presence. Any break in the chain of custody caused by Bachman's absence goes to the weight of the evidence and not to its admissibility. *United States v. Colatriano*, 624 F.2d 686 (5th Cir. 1980); *United States v. Henderson*, 588

2. Ken was paid $1,500.00 for his efforts as an informer. Hughes' theorizes that Ken substituted cocaine valued at $62,500.00 for mannitol in order to earn his fee.

F.2d 157 (5th Cir.), *cert. denied*, 440 U.S. 975, 99 S.Ct. 1544, 59 L.Ed.2d 794 (1979). We need only determine whether there was sufficient evidence to support a finding of a reasonable probabiity that the cocaine had not been altered in any important respect from its original condition. *United States v. Albert*, 595 F.2d 283 (5th Cir.), *cert. denied*, 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979). *United States v. Stewart*, 579 F.2d 356 (5th Cir.), *cert. denied*, 439 U.S. 936, 99 S.Ct. 332, 58 L.Ed.2d 332 (1978); *Gallego v. United States*, 276 F.2d 914 (9th Cir. 1960). Circumstantial evidence is admissable to show a connection between physical evidence and the defendant, *United States v. Soto*, 591 F.2d 1091 (5th Cir.) *cert. denied*, 442 U.S. 930, 99 S.Ct. 2862, 61 L.Ed.2d 298 *cert. denied; Pardon-Gonzalez v. United States*, 444 U.S. 845, 100 S.Ct. 89, 62 L.Ed.2d 58 (1979), and, on review, we must accept the fact finder's version of the evidence unless it is clearly erroneous. *United States v. Jonas*, 639 F.2d 200 (5th Cir. 1981); *United States v. Duckett*, 583 F.2d 1309 (5th Cir. 1980). While the record discloses a change in the quantity of cocaine (thanks to Ken's desire to own a pet cocaine "rock"), there is no indication of any sustitution of the substance itself. There is ample evidence to support the conclusion that the white powdery material which was in the plastic bag before Bachman left the room was the same substance that was in the bag upon his return.

Hughes also assigns as error the trial court's refusal to admit the testimony of a police officer and a parole officer to prove that Ken, the informer, was under investigation. Rule 609 of the Federal Rules of Evidence provides for the impeachment of a witness because of a prior conviction but evidence of arrests or investigations is not admissible. *United States v. Hodnett*, 537 F.2d 828 (5th Cir. 1976); *United States v. Alvarado*, 519 F.2d 1133 (5th Cir.), *cert. denied*, 424 U.S. 911, 96 S.Ct. 1107, 47 L.Ed.2d 315 (1975). It was therefore proper to exclude this proffered evidence.

Hughes next challenges the trial court's limitation of his examination of Ken. Hughes called Ken as a defense witness for the sole purpose of impeachment. *See* Fed.R.Evid. 607. After having Ken declared a hostile witness, Hughes conducted a vigorous attack on his character. The district court sustained objections to several questions on the grounds that they were irrelevant. The appellant now enumerates as error the trial judge's handling of the entire examination.

We need not delineate each of the rulings in order to decide the issue presented. Hughes was generally successful in his avowed purpose. He showed that Ken was a paid informer, that he was on parole when he assisted the government in this case, that he had probably received favorable parole consideration because of his cooperation in drug cases, and that he was a convicted felon. Perhaps the most damaging effects of the cross-examination were the discrepancies in Ken's testimony concerning the number of his proper convictions and his status as a parolee at the time of Hughes' arrest. Ken corrected these misstatements only when confronted with evidence of their falsity. Record, vol. VI, at 269-336. A review of Ken's testimony as a whole reveals that Hughes was permitted to make the points which he now complains were denied him. As stated in the appellant's brief, "Appellant's counsel during the trial amply demonstrated the informant's possible bias and his motive to frame the Appellant and his motive to testify on behalf of the Government." Appellant's Brief at 24. Since the jury clearly had sufficient information to appraise the bias and motives of the witness, any restrictions imposed by the trial judge were not prejudicial to the appellant. Fed.R.Crim.P. 52(a); *United States v. Salsedo*, 607 F.2d 318 (9th Cir. 1979); *see United States v. Heller*, 625 F.2d 594 (5th Cir. 1980).

The appellant also maintains that the district court erred in sustaining the government's motion *in limine* to prohibit questions concerning Ken's address. We begin by

noting that since the appellant did not object to either the motion or the ruling, Record, vol. VI, at 268, we must review the record as a whole only to determine whether the court's ruling was plain error affecting substantial rights. Fed.RCrim.P. 52(b); *United States v. Bibbs*, 564 F.2d 1165 95th Cir. 1977), *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1877, 56 L.Ed.2d 388 (1978). In view of the facts of this case, we cannot find that requisite plain error. This is not a situation in which the informant's identity or whereabouts were unknown; Ken was made available to the defense for an interview. *Cf. Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); *United States v. Ayala*, 643 F.2d 244 (5th Cir. April 20, 1981); *Ashley v. Wainwright*, 639 F.2d 258 (5th Cir. 1981). Moreover, he did not testify for the government; he was called as a hostile defense witness. When confronted with a motion to disclose the address of an informer, a trial judge can call on no fixed rule to guide his his decision but must instead balance in each case the bvenefits to the defendant of disclosure against the resulting harm to the government. *Roviaro v. United States, supra; United States v. Bower*, 575 F.2d 499 (5th Cir.), *cert. denied*, 439 U.S. 983, 99 S.Ct. 572, 58 L.Ed.2d 654 (1978). While there was no mention here of possible harm to Ken as a result of his testimony, "It is no secret that informers whose identies are revealed prior to the trial are often 'among the missing' when the trial date finally arrives." *United States v. Hernandez*, 608 F.2d 741 (9th Cir. 1979). Thus, in almost every drug case involving an informant, the government has *some* interest in non-disclosure. Here, there was no advantageous purpose to serve the appellant in requiring the disclosure of Ken's address. The only possible benefits of this information to Hughes would be twofold: (1) placing the witness in his proper setting in order to facilitate impeachment, *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968); *Alford v. United States*, 282 U.S. 687, 51 S.Ct.218, 75 L.Ed.

624 (1931); and (2) locating the witness so that he will be available to testify. *United States v. Gentile*, 495 F.2d 626, 633, 634 at n. 9 (5th Cir. 1974); *see United States v. Ayala*, *supra*; *Ashley v. Wainwright*, *supra*. There was no necessity to know of Ken's address to accomplish either of these goals. Since Ken was called as a defense witness, his address was obviously not needed to compel his attendance in court. And while knowledge of the location of a witness's present address may be an important element of cross-examination, *Smith v. Illinois*, *supra* Ken's character was, as stated earlier, thoroughly penetrated by the appellant's examination. The scope of a hostile witness' examination is a matter within the trial court's sound discretion, *Smith v. Illinois*, *supra*, *United States v. Markham*, 537 F.2d 187 (5th Cir. 1976), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977), and since Hughes was afforded ample opportunity to accomplish his objectives without the necessity or the desired disclosure, the trial judge's ruling did not amount to plain error. *See United States v. Elorduy*, 612 F.2d 986 (5th Cir.), *cert. denied*, 447 U.S. 910, 100 S.Ct. 2997, 64 L.Ed.2d 861 (1980).

The appellant complains of error in sustaining the government's objection to the following remarks made by defense counsel in his closing argument to the jury:

> MR. GRAHAM: the United States Attorney, his witness is Gene Bachman, and Bachman testified—I checked. I checked the record for Lankford. How did he check it? "I checked it through the NCIC which is a computer system—
>
> MR. ZIMIT: Objection, Your Honor.

Record, vol. VI, at 427. The court sustained the objection on the belief that defense counsel was attempting to pursue an improper argument to the effect that Agent Bachman knew Ken's last name long before he revealed it to the defense. If the court misunderstood the purpose of the question, defense counsel must share the responsibility. The judge repeatedly warned Hughes' attorney to refrain

from commenting on evidence not in the record and the last such warning was provoked by counsel's statement that he was not promptly furnished Ken's last name. Record, vol. VI, at 426-7. In any event, if, as the appellant now claims, the purpose of the comment was to impeach Agent Bachman by demonstrating that he did not thoroughly investigate Ken's record, there was no prejudice because the lawyer was allowed to make precisely that same point repeatedly in his summation. Hughes' counsel argued that Agent Bachman "conducted a very thorough search, so thorough that he didn't come up with anything. We were the ones who came up with his record, his real record." Record, vol. VI, at 426. Subsequently, Hughes' attorney stated to the jury:

> I believe that you have Officer Bachman. He testified under oath that Lankford was not on probation as far as he knew at the time that he was using Lankford as an informer.
>
> We brought in the probation officer who said that he was. That is how great an agent that man is.

Record, vol. VI, at 428-9. Since the appellant achieved his purpose, he has no grounds for complaint.

The contention that the government did not lay a proper foundation for the admission into evidence of taped conversations between the appellant, Ken, and Agent Bachman is likewise without merit. While there are no formalistic standards governing the admissibility of tapes, *United States v. Greenfield*, 574 F.2d 305 (5th Cir.), *cert. denied*, 439 U.S. 860, 99 S.Ct. 178, 58 L.Ed.2d 168 (1978), as a general rule the government is required to prove the competency of the operator, the fidelity of the recording equipment, the absence of material alterations in the relevant portions of the recording, and the identity of the speakers. *United States v. Biggins*, 551 F.2d 64 (5th Cir. 1977). The trial judge, however, has broad discretion in determining the admissibility of such evidence and, while strict compliance with the government's particularized burden is the

preferred method, the paramount purpose of the inquiry is to insure the accuracy of the recording. *United States v. Gorel*, 622 F.2d 100 (5th Cir. 1979) *cert. denied*, 445 U.S. 943, 100 S.Ct. 1340, 63 L.Ed 2d 777 (1980); *United States v. Biggins, supra; see United Sates v. Williams*, 578 F.2d 67 (5th Cir. 1978); *United States v. Greenfield, supra.* In the present case, the government failed to offer any evidence of the competency of the operator or the fidelity of the recording equipment. While compliance with the *Biggins* criteria would have been preferable, the evidence here discloses that the trial court was correct in admitting the tapes. The tapes in this instance are more reliable than those properly admitted under similar facts in *United States v. Biggins, supra.* Here, as in *Briggins*, the government's failure to show the competency of either the operator or the machine was overshadowed by evidence which demonstrated the reliability of the tapes. The tapes accurately reiterated the sworn testimony of the DEA agent. The speakers were identified by their voices on the basis of past conversations with the agents. *See* (Fed.R.Evid. 901(b)(5). Furthermore, Hughes admitted on cross-examination that it was his voice on the tapes telling Agent Bachman that he wanted to set up the drug deal. Record, vol. VI, at 365. The chain of custody was clearly shown and there was no hint at trial that the tapes may have been altered. Unlike *Biggins*, the government here provided an additional indicia of reliability when Agent Bachman testified that the tapes were accurate reflections of the conversations in issue. Agent Bachman aslso replayed the tapes in Ken's presence to verify the accuracy of the recordings. *See United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916, 95 S.Ct. 1577, 43 L.Ed.2d 782 (1975). Where there is sufficient independent evidence of the accuracy of the tape recordings to insure their reliability, we will not disturb the trial court's decision to admit them even though at the time that judgment was made the government had not

carried its particularlized burden. *United States v. Gorel*, 622 F.2d 100 (5th Cir. 1979); *United States v. Biggins*, *supra*.

Finally, Hughes objects to several of the prosecutor's closing remarks and questions propounded to Hughes on cross examination. Most of the remarks excepted to appear to be fair comments on the evidence, but the prosecutor did tell the jury that Hughes looks and acts like a drug dealer. While such statements are unfortunate, they must be viewed in the context of the entire record to determine whether they prejudicially affected substantial rights of the defendant. *United States v. Dorr*, 636 F.2d 117 (5th Cir. 1981); *United States v. Hoskins*, 628 F.2d 295 (5th Cir.), *cert. denied*, ____U.S.____, 101 S.Ct. 406, 66 L.Ed.2d 249 (1980); *United States v. Risi*, 603 F.2d 1193 (5th Cir. 1979). In light of the fact that this was an isolated instance and in view of the overwhelming evidence against the defendant, we have no difficulty in concluding that the prosecutor's remarks were not so prejudicial as to require a new trial.

On cross-examination, Hughes was asked whether he realized that according to his version, he would have been defrauding Agent Bachman. The objection on grounds of relevancy was overruled. Considering the overwhelming evidence against Hughes and noting that the trial judge instructed the jury not to consider any conduct or offense not alleged in the indictment, we believe that if the ruling was error, it was certainly harmless. *United States v. Cross*, 638 F.2d 1375 (5th Cir. 1981). Hughes was asked whether his wife left him because of his participation in illegal drug transactions. The trial judge sustained an objection to the question and denied Hughes' motion for a mistrial. Hughes claims that a mistrial should have been granted because the question was prejudicial. We find no error in the trial judge's ruling. *See United States v. Hernandez*, 646 F.2d 970 (5th Cir. 1981); *United States v. Mack*, 643 F.2d 1119 (5th Cir. 1981).

For the foregoing reasons, Hughes' conviction is AFFIRMED.

THE SOUTHERN DISTRICT OF FLORIDA
Docket No. 79-6083-CR-ALH

DONALD HUGHES
Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on September 19, 1980, with counsel, Maurice Graham, Esquire.

There being a finding/verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy to knowingly and intentionally distribute a quantity of a Schedule II controlled substance, to wit: cocaine in violation of Title 21, U.S.Code, Section 841 (a) (1) in Count One. Did knowingly and intentionally distribute a quantity of cocaine, a Schedule II controlled substance, in violation of Title 21, U.S. Code, Section 841 (1)(1) and Title 18 U.S. Code, Section 2 in Count three.

The court asked defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR imprisonment as to Count One. FURTHER ORDERED AND ADJUDGED that the defendant is committed to the custody of the Attorney General, or his authorized representative for imprisonment for a period of ONE (1) YEAR as to Count three and that execution of sentence of confinement shall be suspended and the defendant be placed on probation for a period of THREE (3) YEARS to run concurrent with sentence imposed in Count One.

It is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed.

The court orders commitment to the custody of the Attorney General.

Signed: ALCEE L. HASTINGS
United States District Judge

SOUTHERN DISTRICT OF FLORIDA CASE NO. 79-6083-CR-ALH

UNITED STATES OF AMERICA,
Plaintiff,

v.

DONALD HUGHES, et. al.,
Defendants. ORDER ON PRETRIAL MOTIONS

THIS CAUSE came before the Court on the Petition of the defendant, DONALD HUGHES, for a hearing on the Magistrate's Report and Recommendation on HUGHES' Motion to Suppress Physical Evidence and on Defendant's Motion to Dismiss the Indictment due to Government delay tactics. The Defendant has also objected to the denial by the Magistrate of his motions to sever trial, to dismiss or compel election, and to dismiss or elect as to Counts II and III of the Indictment.

On January 8, 1980, an evidentiary hearing was held on the Defendant's Motion to Suppress before the Honorable Herbert S. Shapiro, United States Magistrate. The Magistrate recommended denying the Motion to Suppress A re-hearing on the Motion to Supress before this Court was granted but postponed due to Defendant's request that he first be allowed to interview the Confidential Informant in this case. The re-hearing was finally held on April 3, 1980, at which time testimony and oral argument were presented to the Court.

As found by the Magistrate in his Report and Recommendation, the testimony established that while the Defendant and Drug Enforcement Administration Agent Bachman left the motel room in which the transfer of the cocaine had taken place, the Confidential Informant, Kenny, and Defendant, MICHAEL MANN, were alone with the evidence in question, a plastic bag of cocaine.

Amidst the powder in the bag was a large rock of cocaine. The plastic bag was on a counter in the room when Agent Bachman left the room and when he returned; he was gone for about 5 to 10 minutes. Subsequently, in the parking lot, after Defendant Mann told another agent that Kenny had taken some of the cocaine for himself, Agent Bachman discovered that the cocaine rock was no longer in the plastic bag and approached the Confidential Informant. When Agent Bachman informed Kenny that he would have to search him, the Confidential Informant promptly turned over a cocaine rock like that which had been in the plastic bag. Kenny was not searched. The clear implication from these facts is that during the time Agent Bachman was absent from the motel room, Kenny removed the large cocaine rock from the plastic bag.

Physical evidence of a crime will be admissible at trial if the government can show that it is in substantially the same condition as when the crime was committed. *United* States v. Brown, 605 F.2d 389 (8th Cir. 1979); *United States v. Barnes*, 586 F.2d 1052 (5th Cir. 1978); *United States v. Medowell*, 539 F.2d 435 (5th Cir. 1976); *United States v. Brown*, 482 F.2d 1226 (8th Cir. 1973). The possibility of misidentification and adulteration must be eliminated, not absolutely, but to a degree of reasonable certainty. *United States v. Jones*, 404 F. Supp. 529 (E.D. Pa. 1975); *United States v. Robinson*, 447 F.2d 1215 (D.C. Cir. 1971). In *United States v. Barnes*, *supra* at 1056, the Fifth Circuit indicated that the absence of a showing of physical tampering IN ANY RELEVANT RESPECT is the real key to establishing the requisite chain of custody. The Fifth Circuit has also indicated that whether the Government has established an adequate chain of custody goes to the weight rather than the admissibility of the physical evidence. *United States v. Henderson*, 588 F.2d 157 (5th Cir. 1979).

At most, the testimony in this case indicates that the Confidential Informant took some of the cocaine for himself, not that he adulterated or switched it. In any event, the

action complained of by Defendant HUGHES occurred before the physical evidence was actually seized by the Government agents and the chain of custody established. Should this physical evidence be presented at a trial in this cause, testimony as to the actions of the Confidential Informant would bear upon its weight and not its admissibility. There is simply insufficient evidence of adulteration or such tampering as would support suppression of the cocaine at this time.

Having carefully reviewed the record in this cause, the memoranda, and the applicable law, having listened to extensive testimony and oral argument, and being otherwise fully advised in these matters, it is hereby

ORDERED AND ADJUDGED that Defendant HUGHES' Motion to Suppress Physical Evidence is DENIED. Findings of Fact and Conclusions of Law in the Report and Recommendation of the Honorable Herbert S. Shapiro, United States Magistrate, are concurred in and adopted by this Court. It is further

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss the Indictment due to alleged delay tactics by the Government is DENIED. It is further

ORDERED AND ADJUDGED that the Magistrate's Order of January 14, 1980 denying several motions filed by DONALD HUGHES is affirmed. Defendant's Motion to Sever Trial, Motion to Dismiss or Compel Election, and Motion to Dismiss or Elect as to Counts II and III are DENIED.

DONE AND ORDERED in chambers in Miami, Florida this _____ day of_____, 1980.

/S/

ALCEE L. HASTINGS
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel.